the Bureau of Internal Revenue, for answer to the petition filed by the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in Paragraph 1 of the petition.

2. Admits the allegations contained in Paragraph 2 of the petition.

3. Admits the allegations contained in Paragraph 3 of the petition.

4. Denies the errors alleged in Paragraph 4, subparagraphs A, B and C of the petition.

5. Denies the allegations of fact set forth in subparagraphs A, B, and C of Paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's petition be denied.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Of counsel:
GEORGE D. BRABSON,
V. F. WEEKLEY,
Special Attorneys, Bureau of Internal Revenue.

VFW/nc 5/4/35

13 AMENDMENT TO PETITION.

Filed at Hearing, Feb. 24, 1936.

(Title Omitted.)

Comes now the Petitioner, after receiving permission from the United States Board of Tax Appeals, and amends subparagraph "A" of paragraph numbered 4 so that it will read as follows, to-wit:

"That the Commissioner erred in determining that the petitioner was neither an officer nor an employee of the State of Florida, engaged in the exercise of an essential governmental function during the years 1931 and 1932."

H. M. VOORHIS,
Attorney for William H. Tunnicliffe, the Petitioner.

---

14 MEMORANDUM OPINION.

United States Board of Tax Appeals.

William H. Tunnicliffe, Petitioner,
v. Docket No. 78714.
Commissioner of Internal Revenue, Respondent.

H. M. Voorhis, Esq., for the petitioner.
C. A. Ray, Esq., for the respondent.

SMITH: This proceeding involves deficiencies in petitioner's income tax for 1931 and 1932 in the amounts of $34.66 and $2,689.12, respectively. The deficiencies for both years result from the addition to the petitioner's gross incomes of certain amounts received by

him in those years as compensation for his services as liquidator of several banks in the State of Florida. Whether this compensation is taxable to the petitioner in the years when received or whether it is exempt from taxation on constitutional grounds is the only question in issue in this proceeding.

In 1930 the petitioner was appointed liquidator of eleven banks in central Florida. The appointments were all made by the State Comptroller pursuant to section 19 of chapter 13576 of the General Laws of Florida (1929). The section of the statute referred to reads in material part as follows:

"On becoming satisfied, from the reports furnished to him by a State Bank Examiner, or upon other satisfactory evidence thereof, that any bank, banking firm, banker, banking or trust company, or corporation doing business in this State under the State laws, has become insolvent and is in default * * *, the State Comptroller may in his discretion forthwith designate and appoint a liquidator to the charge of the assets and affairs of such bank, and require of him such bond and security as the Comptroller deems proper, not exceeding double the amount that may come into his hands, and such liquidator shall be subject to dismissal by the Comptroller, whenever in his judgment such dismissal is deemed necessary or advisable; when one liquidator is dismissed, another may be duly designated and appointed. Such liquidator under the direction and supervision of the Comptroller, shall take possession of the books, records and assets of every description of such bank, banker, banking firm, banking and trust company, or corporation, and in his name shall sue for and collect all debts, dues and claims belonging to it, and upon the order of a Court of competent jurisdiction may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such bank, banker, banking firm, banking

and trust company, or corporation, on such terms as the Court shall direct; * * * Such liquidator shall pay all money received by him to the State Treasurer to be held as a special deposit for the use and benefit of the creditors, subject to the order of the Comptroller, and shall also make quarterly reports to or when called upon, to the Comptroller of all of his acts and proceedings."

Section 21 of the statute provides that—

"All expenses of any liquidator shall be paid out of the assets of such bank, banker, banking firm, banking or trust company, or corporation before distribution of the proceeds thereof. The compensation of the liquidator shall be fixed by the Comptroller, and shall be based upon the amount of work actually necessary and performed, and shall in no case exceed five per cent of the cash collections."

16 Section 23 of the statute provides that—

"The provisions of this Act shall apply to all receivers of any bank, banking firm, or banking or trust company, heretofore appointed by the order of any Circuit Court, and all such receivers, both these hereunder and those heretofore appointed by the Circuit Court shall at all times be under the supervision and control of the Comptroller, and subject at all times to summary discharge and dismissal by him, and any vacancy in such receivership may be filled by the Comptroller at any time."

On being appointed liquidator of the several banks petitioner took no oath of office but was required to give bond in each appointment. He served as liquidator of some or all of the eleven banks during 1931 and 1932, receiving as compensation for his services

$5,833.33 in 1931 and $25,237.36 in 1932. The amount of his compensation was fixed by the Comptroller and represented about 2½ per cent of the funds collected by the petitioner in disposing of the assets of the liquidating banks. All such funds were received by the petitioner and remitted by him to the State Treasurer. The State Treasurer deposited five per cent of such funds in a special "Liquidator's Account" from which the petitioner drew his compensation by warrants signed by the State Treasurer and the Comptroller.. The bulk of the deposits was made in this account in 1930 and 1931. In the performance of his duties as liquidator the petitioner acted under the immediate supervision and direction of the State Comptroller who approved in advance all sales of bank properties. The petitioner devoted all of his time to these duties in both of the taxable years involved.

In his income tax returns for 1931 and 1932 the petitioner did not include in his taxable income the compensation received in those years for his services as liquidator. In explanation of the exclusion of those amounts from taxable income the 1932 return contains the following notation:

17 "ITEM 18: Article 88, Reg. 69, specifically includes compensation received in commissions as 'Receivers appointed by State Courts' as being exempt, also IT 2214 CB IV-2-2402 on Page 99 of Digest 22 rules that Receivers of State Banks in Kansas are officers of the State and compensation from that source is nontaxable under Rev. Acts of 1921 & 24, it is presumed to be applicable to 1926 & 1928 Acts in other States than Kansas..

(The above ruling given to me in communication from F. R. Clute, Internal Revenue Agent in Charge at Jacksonville, Florida; such letter being dated February 26th, 1929.)"

The petitioner's returns for 1931 and 1932 were made on the cash receipts and disbursements basis.

To be exempt from Federal taxation on constitutional grounds the income here in dispute must have been received by the petitioner from the State of Florida for services performed either as an officer or employee of the State in the exercise of an essential governmental function of the State. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514; 5 A. F. T. R. 5834. We think that the petitioner was neither an officer nor an employee of the State of Florida but was an independent contractor. He held no statutory office of government but received his appointment from the State Comptroller at whose pleasure he served. His employment was not of a continuous character but was for the duration of the particular work undertaken. *Metcalf & Eddy* v. *Mitchell, supra.* A liquidator appointed to assist the Comptroller in converting the assets of defaulted banks into money for distribution to the depositors and creditors stands in approximately the same relationship to the State as an attorney appointed to assist the Attorney General in special litigation. *George Z Medalie*, 30 B. T. A. 1284; *Commissioner* v. *Murphy*, 70 Fed. (2d) 790; 14 A. F. T. R. 194; *Lucas* v. *Reed*, 281 U. S. 699; 8 A. F. T. R. 11261.

The liquidating banks were not owned by the State and were not instrumentalities of any of the State's governmental departments. The State's interest in them was to see that they functioned in compliance with its regulatory laws and, upon their failure as private institutions, to see that their assets were distributed fairly and equitably among those entitled to receive them. The tax imposed by the Federal government upon the income paid to the petitioner for assisting in this undertaking did not place such a burden upon the State of Florida as the Constitution prohibits. See *Helvering* v. *Powers*, 293 U. S. 214; 14 A. F. T. R. 709.

18

We held in *Carl Newman Davie*, 26 B. T. A. 1007, that the constitutional exemption from taxation did not apply to compensation received for legal services rendered in liquidating insolvent banks under direction of the Superintendent of Banks of the State of Georgia. Our decision in that case is controlling in the instant proceeding. See Commissioner's Ruling, dated January 17, 1936, published in Internal Revenue Bulletin No. 5, February 3, 1936.

In his petition the petitioner alleges—

> "B. That the Commissioner erred in determining that petitioner's income on which deficiency tax was assessed for the year 1932 was earned and accrued during the year 1932."

In his brief the petitioner submits the following argument in support of this contention:

> "Point 2. In making his returns for the years 1931 and 1932 the taxpayer relied upon the letter received from F. R. Clute, Internal Revenue Agent in Charge at Jacksonville, Florida, dated February 26th, 1929, reference to which is made in the taxpayer's return for the year 1932. Consequently, he made the return of the income from his investments on a cash basis, whereas he could have made his returns on an accrual basis had it not been conceded by the letter above mentioned that his income as liquidator was not subject to tax."

This contention is without merit. Admittedly the petitioner made his income tax returns upon the cash receipts and disbursements basis. It does not appear that he requested permission of the respondent to make

them upon an accrual basis. The income
19 which the petitioner received in 1932, although some of it was earned by him in a prior year. must therefore be included in his 1932 return.

Judgment will be entered for the respondent.

Enter:
Entered June 10, 1936.

(Seal)

---

20 DECISION.

United States Board of Tax Appeals,
Washington.

William H. Tunnicliffe, Petitioner,
vs. Docket No. 78714
Commissioner of Internal Revenue, Respondent.

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion entered June 10, 1936, it is

Ordered and Decided: That there are deficiencies of $34.66 and $2,689.12 for the years 1931 and 1932, respectively.

(Signed) CHARLES P. SMITH,
Member.

Enter:
Entered June 10, 1936.

(Seal)

21 PETITION OF WILLIAM H. TUNNICLIFFE FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE FIFTH CIRCUIT OF THE DECISION BY THE UNITED STATES BOARD OF TAX APPEALS (Filed June 10, 1936.)

Received Aug. 31, 1936.

Filed Aug. 31, 1936.

(Title Omitted.)

William H. Tunnicliffee, the petitioner in this cause, by H. M. Voorhis, counsel, hereby files petition for a review by the United States Circuit Court of Appeals of the Fifth Circuit of the decision by the United States Board of Tax Appeals rendered on June 10th, 1936, determining deficiencies in the petitioner's Federal income tax for the calendar years 1931 and 1932, in the respective amount of $34.66 and $2,689.12.

I.

The petitioner is an individual whose residence and address are Sanford, Florida.

22 II.

Nature of Controversy.

The controversy involves the proper determination of the petitioner's liability for Federal income tax for the calendar years 1931 and 1932.

The petitioner in the year 1930 was appointed as liquidator for eleven closed banks in central Florida by

the Comptroller of the State of Florida pursuant to Section 19 of Chapter 13576 of the General Laws of Florida (1929). He took no oath of office but gave bond in the amount of $75,000.00 and devoted all of his time to the liquidation of said banks during the years 1930, 1931 and 1932. He performed his duties under the supervision and control of the Comptroller of Florida and was subject to summary discharge and dismissal by the said Comptroller. In remitting the proceeds from collections for the various closed banks to the State Treasurer of Florida the petitioner made two checks, one in the amount of 95% of the collections, and the other in the amount of 5%. The latter check was deposited in an account called "Liquidator's Commission Account." From this account the petitioner was paid for his services by warrant drawn by the Comptroller and countersigned by the Treasurer. For the years 1931 and 1932 the petitioner was paid approximately 2½% of the amount of money in the Liquidator's Commission Account. During the year 1931 the petitioner received as compensation for his services $5,833.33, and during the year 1932, $25,-
23 237.36. The petitioner shows the receipt of the above amounts on his respective income tax returns, but excluded the amounts from his taxable income, and placed the following notation on said returns:

"Item 18: Article 88, Reg. 69 specifically includes compensation received in commissions as 'Receivers appointed by State Courts' as being exempt, also IT. 2214, CB-IV-2-2402 on Page 99 of Digest 22 Rules that Receivers of State Banks in Kansas are officers of the state, and compensation from that source is non-taxable under Rev. Acts of 1921 & 24, it is presumed to be applicable to 1926 & 1928 Acts in other states than Kansas. (The above ruling given to me in communication from F. R. Clute, Internal Revenue Agent

in Charge at Jacksonville, Florida; such letter being dated February 26th, 1929)."

The Commissioner of Internal Revenue held that the amount received by the petitioner for the years 1931 and 1932 as compensation for his services as liquidator could not be excluded from his taxable income.

III.

The said William H. Tunnicliffe being aggrieved by the finding of fact and conclusions of law contained in the said finding and opinions of the Board of Tax Appeals, and by its decision entered pursuant thereto, decided to obtain a review thereof by the United States Circuit Court of Appeals for the Fifth Circuit.

IV.

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals.

24 1. The holding that the petitioner was not an officer of the State in the exercise of an essential governmental function of the State.

2. The holding that the petitioner was not an employee of the State in the exercise of an essential Governmental function of the State.

3. The holding that the petitioner was an independent contractor.

4. The failure to notice that petitioner was appointed pursuant to a statute which defined his duties and regulated his compensation.

5. The failure to hold that the supervision of banks and banking is an essential Governmental function of the State.

6. The holding that the Federal Government tax upon the income paid to the petitioner did not place such a burden upon the State of Florida as the Constitution prohibited.

7. The finding of deficiencies for the years 1931 and 1932 in lieu of the determination that there is no income tax due from the petitioner for either of the years in controversy.

H. M. VOORHIS,
Counsel for Petitioner,
Florida Bank Building, Orlando, Florida.

25 State of Florida,
County of Orange.

H. M. Voorhis being first duly sworn says that he is Counsel of record in the above named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein and the statements are true to the best of his knowledge, information and belief.

H. M. VOORHIS.

Subscribed and sworn to before me this 22nd day of August, 1936.

MARY B. HUFFAKER,
Notary Public State of Florida at Large.
My commission expires 3-21-38.

(Notarial Seal)

26 PRAECIPE FOR RECORD.

Received Oct. 2, 1936.

Filed Oct. 2, 1936.

(Title Omitted.)

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals of the Fifth Circuit, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies, thereof to-wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition for Redetermination;

27 (b) Answer of Respondent;

(c) Amendment to the petition filed February 24th, 1936.

(3) The findings of fact and opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review, filed by the petitioner in the above cause.

(6) This praecipe.

H. M. VOORHIS,
Counsel for Petitioner,
Florida Bank Building, Orlando, Florida.

CERTIFICATE.

United States Board of Tax Appeals,
Washington.

William H. Tunnicliffe, Petitioner,
vs. Docket No. 78714
Commissioner of Internal Revenue, Respondent..

I, B. D. GAMBLE, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 27, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 12 day of Oct., 1936.

B. D. GAMBLE,
Clerk, United States Board of
Tax Appeals.

(Seal)

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of February 1st, 1937

No. 8259

WILLIAM H. TUNNICLIFFE

v.

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, upon the joint request of counsel, and, after argument by H. M. Voorhis, Esq., for petitioner, and Howard P. Locke, Esq., Special Assistant to the Attorney General, for respondent, was submitted to the Court.

Petition for review of decision of United States Board of Tax Appeals (District of Florida)

March 9, 1937

Before FOSTER, SIBLEY, and HUTCHESON, Circuit Judges

SIBLEY, Circuit Judge: This petition for review involves similar facts and the same questions dealt with in the opinion this day filed in No. 8212, John H. Therrell vs. Commissioner of Internal Revenue. For the reasons stated in that opinion the judgment is reversed with direction to eliminate the contested tax.

Reversed.

HUTCHESON, Circuit Judge, dissenting.

Judgment

Extract from the Minutes of March 9th, 1937

No. 8259

WILLIAM H. TUNNICLIFFE

v.

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of William H. Tunnicliffe for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court, that the judgment of the said United States Board of Tax Appeals in this cause be, and the same is hereby, reversed, with direction to eliminate the contested tax.

HUTCHESON, Circuit Judge, dissenting.

Clerk's certificate

United States of America

United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 28 to 31 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said court, numbered 8259, wherein William H. Tunnicliffe is petitioner, and Commissioner of Internal Revenue is respondent, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 27 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 24th day of May A. D. 1937.

[SEAL]

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1937

Order allowing certiorari

Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice BLACK took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE, 1937